SERVED: June 8, 1994

NTSB Order No. EA-4179

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 25th day of May, 1994

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. RICHARD J. BODOVINITZ, Respondent.	Docket SE-13366

OPINION AND ORDER

Respondent, appearing pro se, and the Administrator have both appealed from the oral initial decision issued by Administrative Law Judge Jerrell R. Davis at the conclusion of an evidentiary hearing held in this case on January 21, 1994.[1] In that decision, the law judge affirmed the allegations contained

[1] Attached is an excerpt from the hearing transcript containing the oral initial decision.

in the Administrator's emergency order[2] revoking respondent's airline transport pilot (ATP) certificate, flight instructor certificate, and his second-class medical certificate, based on his alleged intentional falsification of two applications for medical certification, in violation of 14 C.F.R. 67.20(a)(1).[3] However, the law judge modified the sanction from revocation of all of respondent's certificates, as requested by the Administrator, to revocation of his medical certificate only, and a 60-day suspension of his ATP certificate. For the reasons discussed below, respondent's appeal is denied and the Administrator's appeal is granted.

It is undisputed that, on October 26, 1990, respondent was convicted of misprision of a felony (failing to act upon knowledge that others possessed marijuana with intent to distribute),[4] and sentenced to one year probation. (Exhibit C-

---

[2] After the Administrator filed the complaint, respondent waived the applicability of the expedited rules of procedure which otherwise govern emergency proceedings. (49 C.F.R. Part 821, Subpart I.)

[3] Section 67.20(a)(1) provides as follows:

§ 67.20 Applications, certificates, logbooks, reports, and records: Falsification, reproduction, or alteration.

(a) No person may make or cause to be made --
(1) Any fraudulent or intentionally false statement on any application for a medical certificate under this part.

[4] Respondent was initially indicted for conspiracy to import marijuana from Mexico into the United States, and admitted that he had in fact participated in such a conspiracy and had flown marijuana into the country. (Tr. 49-50.) However, in light of respondent's assistance in obtaining convictions against other participants in the conspiracy, respondent was permitted to plead guilty to the lesser charge of misprision of a felony. (Tr. 19-

3.) It is also undisputed that, on two applications for airman medical certification dated October 31, 1991, and November 3, 1992, respondent checked "no" to question 18w, which asks whether the applicant has a "[h]istory of other conviction(s) (misdemeanors or felonies)." (Exhibit C-4, p. 2-5.)

At the hearing respondent testified that he believed question 18w sought information only about misdemeanor or felony convictions relating to the applicant's driving record. (Tr. 45-46.) In support of the reasonableness of this purported belief, respondent asserted that he read question 18w in the context of question 18v, which refers to driving-related convictions, and language at the end of the form authorizing the release of information from the National Driver Register pertaining to the applicant's driving record. Respondent asserted that the form was "very very confusing," and suggested that question 18w should be phrased "history of other than driving convictions." (Tr. 46, 51.)

The law judge rejected respondent's explanation, finding that his claimed "correlation of the two items [18v and 18w] stretches credulity beyond a reasonable limit." (Edited initial decision at Tr. 73.) The law judge concluded that respondent's responses to question 18w were intentionally false and in violation of section 67.20. (Tr. 73.) While affirming the revocation of respondent's medical certificate, the law judge found that revocation of respondent's pilot certificate was too

(..continued)
20.)

harsh a sanction, considering what he perceived to be the "special circumstances" of this case. Accordingly, relying on Administrator v. Beirne, NTSB Order No. EA-4034 (1993) as precedent for a lesser sanction, the law judge affirmed revocation of respondent's medical certificate but ordered only a 60-day suspension of his ATP certificate.[5]

On appeal, respondent continues to claim that question 18w is ambiguous and that he fairly interpreted it as limited only to his driving record. In effect, respondent challenges the law judge's rejection of this proffered explanation, and his credibility finding that respondent did understand the import of question 18w. However, we will not overturn the law judge's credibility determination absent extraordinary circumstances, not present here.[6] We agree with the law judge that respondent's explanation does not withstand scrutiny. In light of question 18v's focus on driving-related convictions and administrative actions, we think it is clear that question 18w seeks information about convictions other than those (driving-related) convictions covered by the prior question.[7]

---

[5] The law judge's initial decision makes no mention of respondent's flight instructor certificate, which was also revoked by the Administrator's emergency order.

[6] Administrator v. Wilson, NTSB Order No. EA-4013 at 4-5 (1993) (Board will not overturn a credibility finding unless the law judge acted arbitrarily or capriciously, or unless the result is incredible or against the overwhelming weight of the evidence).

[7] In this regard, we take official notice that the instruction page attached to the medical application form -- to which the applicant is specifically referred in the introductory

Respondent also asserts that the FAA and the NTSB failed to act in a timely manner, apparently referring to the timing of the Administrator's complaint and the Board's scheduling of the hearing. Although the Administrator's complaint was not filed within three days after the Board's receipt of respondent's notice of appeal, as required by our emergency rules[8] (which at that time had not yet been waived), it appears that this was due to respondent's failure to serve the Administrator with a copy of his notice of appeal. According to the Administrator's trial counsel, the complaint was filed the day after the Administrator became aware of the fact that respondent had filed an appeal with the Board. (Tr. 7-8.) We agree with the law judge that the rule as currently written may place an impossible burden on the Administrator in cases where the respondent fails to serve the Administrator with his notice of appeal[9] and, under these circumstances, the Administrator cannot be faulted.[10]

(..continued)
heading to questions 18v and w -- explains that question 18w "asks if you have ever had any other (*nontraffic*) convictions . . ." (Instructions for Completion of FAA Form 8500-8) (emphasis ours).

[8] 49 C.F.R. 821.55(c).

[9] We note that a proposed revision to our rules of practice would alter the wording of section 821.55(c) so as to require the Administrator to file the complaint three days after *his* receipt of the appeal. 58 Fed. Reg. 54102, 54107 (October 20, 1993).

[10] While it is unclear what remedy respondent seeks for the allegedly untimely complaint, we note that an untimely-filed complaint does not deprive the Board of jurisdiction over a respondent's appeal and, absent prejudice, provides no grounds for dismissal of an initial decision. See Administrator v. Callender and Watkins, NTSB Order No. EA-3394 at 4-5 (1993).

Regarding the hearing date (January 21, 1994), we note that the hearing was held only three and a half months after issuance of the emergency order of revocation (October 7, 1993), and two and a half months after the filing of the complaint (November 8, 1993), time periods considerably less than those in the typical non-emergency case.[11] Given respondent's voluntary waiver of the expedited procedures otherwise applicable to emergency proceedings, we find no merit in respondent's suggestion that there was any undue delay in scheduling the hearing in this case.

Nor is there any basis for respondent's motion to dismiss the Administrator's appeal brief as untimely. It was due within 50 days after the oral initial decision was rendered on January 21, 1994.[12] Because the fiftieth day fell on Saturday, March 12, the time was extended until Monday, March 14.[13] Because the certificate of service indicates that the brief was mailed on March 14, 1994, it was timely under our rules.[14] Respondent's assertion that the Administrator failed to provide him with a list of witnesses and witness statements prior to the hearing -- improperly included in his motion to dismiss -- also fails to

---

[11] Though respondent makes reference to "the first notice," which he allegedly received in March 1993, he was not required to surrender his certificates until his receipt of the emergency order itself.

[12] 49 C.F.R. 821.48(a).

[13] 49 C.F.R. 821.10.

[14] 14 C.F.R. 821.7(a) indicates that documents shall be deemed filed on the date of mailing shown on the certificate of service.

provide a basis for reversal, inasmuch as the issue was not raised below and, even if it were, there is no indication that respondent ever requested any pre-hearing discovery.

Turning now to the Administrator's appeal, we agree that the law judge's rationale for modifying the sanction in this case cannot stand. In explaining his reason for reducing the sanction, the law judge stated that this case was different from other falsification cases, in that respondent had nothing to gain by concealing his conviction. (Tr. 60, 62, 74.) The law judge repeatedly referred to respondent's answers to question 18w as "stupid," "dumb," and "senseless," apparently intending to suggest that respondent's falsifications were less egregious because he would not benefit from them. The law judge's view that respondent had nothing to gain was apparently based on testimony given by the Administrator's chief witness (an FAA drug investigation support program coordinator who investigated this case), which the law judge understood to indicate that if respondent had truthfully disclosed his conviction on the medical applications, he would have been issued a medical certificate and no enforcement action would have been taken.

To begin with, it appears that the law judge misunderstood the testimony he relied on. While the witness indicated that there would have been no enforcement action taken *based on falsification* if respondent had revealed his conviction on the medical applications, he made no comment on whether other

enforcement action might have been pursued,[15] and specifically declined to speculate on whether respondent's application for medical certification would have been granted or denied if the conviction had been disclosed. (Tr. 31-33.) Respondent himself recognizes this last point in his reply brief when he describes his understanding of the witness's testimony: "[h]ad I answered yes to 18w, he [the investigating official] would not have proceeded with the revocation, that would have been decided by the FAA Medical Branch." (Reply Br. at 1.)

Furthermore, even assuming that disclosure of his conviction would not have prevented respondent from receiving a medical certificate, we do not think this detracts from the materiality of the falsification, or renders the offense any less egregious. See Administrator v. Johnson, 6 NTSB 720 (1988)(materiality is not defeated because the Administrator has the discretion to determine that some convictions should have no impact on the certification decision -- revocation of airman certificate upheld); Administrator v. Twomey, 5 NTSB 1258 (1986), aff'd. Twomey v. NTSB, 821 F.2d 63 (1st Cir. 1987) (revocation of all

[15] We note, for example, that respondent was potentially subject to enforcement action under section 609(c) of the Federal Aviation Act of 1958, as amended (40 U.S.C. 1429(c)), which requires lifetime revocation of all airman certificates upon conviction of certain drug-related crimes, and under 14 C.F.R. 61.15, which authorizes the Administrator to suspend or revoke any airman certificate based on drug-related convictions. The record indicates that a waiver of revocation under section 609(c) was requested pursuant to section 609(c)(5), but it is unclear whether any waiver was ever granted. We note, however, that a waiver of the unique lifetime revocation requirement of that statute would not necessarily preclude enforcement action pursuant to FAR section 61.15(a)(2).

airman certificates upheld for false backdating of medical application, despite the fact that respondent was medically qualified).

Finally, we agree with the Administrator that the law judge improperly relied on Administrator v. Beirne, NTSB Order No. EA-4034 (1993) as support for a 60-day suspension of respondent's pilot certificate, since the Administrator only sought a 60-day suspension in that case. The Administrator asserts that the suspension sought in Beirne was consistent with the FAA's sanction policy for cases involving, as did that case, falsification of a single drug conviction for simple possession.[16] We note that the same sanction policy specifies revocation of all airman and medical certificates as the appropriate sanction under the circumstances of this case.[17] In any event, dispositively for this case, our own precedent clearly supports revocation of a respondent's airman certificates, as well as his medical certificate, for intentional falsification.[18]

[16] Though not relevant to this appeal, it appears to us that the published sanction policy cited by the Administrator actually indicates that the recommended sanction in Beirne would have been revocation of his medical certificate and a *180-day* suspension of his airman certificate. See Notice of Enforcement Policy, 54 Fed. Reg. 15144 (April 14, 1989); and Compliance and Enforcement Program, FAA Order No. 2150.3A, Appendix 1, Compliance and Enforcement Bulletin 90-2.

[17] The documents referenced in footnote 16, above, recommend revocation of all airman and medical certificates for falsifications of drug-related convictions for more than simple possession.

[18] Administrator v. Johnson, 6 NTSB 720 (1988); Administrator v. Twomey, 5 NTSB 1258 (1986), aff'd. Twomey v. NTSB, 821 F.2d 63 (1st Cir. 1987); Administrator v. Wagner, 5

We cannot agree with respondent that his purported self-imposed one-year suspension from flying immediately following his conviction -- which he characterizes as a "self-induced punishment," but admits was due in part to his inability to gain employment as a pilot during that period (Tr. 52-53) -- is a sufficient remedy for his offense.

In sum, we hold that the law judge erred in modifying the sanction sought by the Administrator in this case, and we reinstate the revocation of respondent's ATP and flight instructor certificates.

(..continued)
NTSB 543 (1985).

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;

2. The Administrator's appeal is granted; and

3. Respondent's medical, ATP, and flight instructor certificates are hereby revoked.

VOGT, Chairman, HALL, Vice Chairman, LAUBER and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.